No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 47-70) is reported at 259 F. 2d 128, and modified at 261 F. 2d 181.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1958 (Pet. 47) and modified on October 27, 1958 (Pet. 65). A petition for rehearing was denied on February 26, 1959 (Pet. 68), and the petition for a writ of certiorari was filed on March 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, having concluded that the case was submitted to the jury on an impermissible "subsidiary conspiracy" theory relating to the statute of limitations, was required to remand the case for entry of judgment for the petitioner rather than for a new trial.

2. Whether the District Court sitting in one division of a district had jurisdiction under an indictment charging a continuing conspiracy where those overt acts alleged to have been committed within the particular division were beyond the statute of limitations and the remaining overt acts within the statute of limitations were alleged to have been committed in another division of the district.

STATUTES INVOLVED

Section 1001 of the Criminal Code (18 U.S.C. 1001) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 145(b) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed. 145(b)) provides:

> Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 2106 of the Judicial Code (28 U.S.C. 2106) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

On November 19, 1953, the petitioner and one Seijas were indicted in the United States District Court for the Western District of Washington, Southern Division, for conspiring, continuously from February, 1942, to April 15, 1953, to violate Section 145(b) of the Internal Revenue Code of 1939 by attempting to evade the individual income taxes of Seijas and his wife for the years 1942 through 1945 and to violate the false reports section of the Crim-

inal Code, as well as Section 145(b) of the Internal Revenue Code by "furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of [Seijas' and petitioner's] partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife * * *." (R. 1-6.)[1] Thirty-three overt acts were alleged. (R. 6-19.) Seijas pleaded guilty (R. 829) and testified as a witness for the Government.

The evidence may be summarized briefly as follows:

In 1941, the petitioner and one Seijas, an attorney, formed a partnership to engage in the business of operating pinball machines in Kitsap County, Washington. (R. 353-354, 357, 666-667.) The number of machines placed in locations by the firm quickly increased from six to between 150 and 200 (R. 360) and early in 1942 the petitioner and Seijas organized two new pinball partnerships (R. 361). After emptying each machine of coins the partnership was supposed to make appropriate deductions for "payouts" and state taxes, and to divide the balance evenly between the partnership and the location owner.

[1] The indictment as originally drawn alleged other related crimes against the revenue (R. 1-5), but those were withdrawn from the jury's consideration (Pet. 11). Seijas alone was charged in the fourteen substantive counts, none of which are before this Court. (R. 3.)

(R. 358-359, 380, 1061.) Beginning in mid-1942, and continuing until December, 1945, the partnership followed the practice of extracting "hold-out" money from the collections at some of the more profitable locations. (R. 426, 1070, 1079.) The "hold-out" money was not reported on the regular receipt forms but was placed in separate sealed envelopes with lists of the pertinent locations and turned over twice each week to the petitioner. (R. 1069-1070, 1072.) The "hold-out" money was received mostly in currency, and over the pertinent years Seijas' share (50%) totalled $86,200. (R. 401-402, 415-416, 461, 463-464, 475-476.) None of the "hold-out" money was reported on the partnership returns or by Seijas on his individual income tax returns. (R. 426, 467-475.) During the pertinent years the petitioner was always furnished with carbon copies of Seijas' tax returns. (R. 467, 475.) Seijas maintained diaries in which he recorded the amounts and precise sources of the "hold-out" money. (R. 266, 268-270, 426, 404-435.)

In July, 1951, at a time when Treasury agents were investigating his income for the years 1941 through 1949, Seijas retained an accountant to prepare a net worth statement for him for those years, in order to ascertain whether it appeared that he had received any unreported income. (R. 243-245.) The accountant concluded that, based on an estimated $50,432.57 cash on hand as of the end of 1945, Seijas had unreported income of some $165,000 for the years 1946 through 1948. (R. 249, 255-

256.)[2] The accountant asked Seijas many times for an explanation of this $165,000, but did not get it, at least until 1953. (R. 251, 262-264.) On April 15, 1953, at the request of Seijas, a conference took place between him and his representatives and officials of the Internal Revenue Service. (R. 306.) He was advised that there had been a recommendation for criminal prosecution against him, based upon excessive increases in his net worth for the years 1946 through 1948 of some $204,000. (R. 307.) In attempting to account for these funds, Seijas and his representatives told the officials that $86,000 had come from the pinball machine routes, and explained in detail how that amount had been "creamed off from the collections" during the years 1942 through 1945, and how the petitioner had received the same amount in the same manner. (R. 310-315.)[3] To substantiate his contention relating to the $86,000, Seijas produced four of his diaries (*supra*), containing many entries in the handwriting of the petitioner. (R. 315-318, 428-429, 431-433.) Seijas did so "for

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[2] On December 29, 1951, Seijas submitted to the Internal Revenue Service this false net worth statement which omitted additional cash on hand of about $150,000, including the $86,200 of unreported profits from the pin-ball partnerships. (R. 217-218, 656-659.) On January 11, 1952, Seijas falsely stated to the Treasury agents that he believed his income for the years 1942 through 1945 had been correctly reported on the returns. (R. 18, 1551-1552.)

[3] Seijas and his representatives explained that Seijas had kept the money in safe deposit boxes in Portland, Seattle and San Francisco, and that instead of having only about $50,000 of cash on hand at the end of 1945, he had had more than $200,000. (R. 256, 318.)

the purpose of trying to eliminate criminal prosecution" (R. 275) for the years 1946-1948, believing that the diaries showing unreported income in the earlier years "were going to put him beyond the Statute of Limitations" (R. 265).

The trial court submitted the case to the jury with instructions that in order that the offense not be barred by the six-year statute of limitations[4] the jury must find an actual, not implied, agreement to continue to conceal the attempted evasion of the tax liability, an act it held was completed in March, 1946. The petitioner was found guilty (R. 99-100) and was sentenced to three years in prison and fined $10,000 (R. 104-105). The court below reversed the conviction on the authority of *Grunewald* v. *United States*, 353 U.S. 391, holding that while the evidence of guilt was "so strong as to be almost overwhelming" (Pet. 53), the prosecution was barred by the six-year statute of limitations since the case had been submitted to the jury on an impermissible theory with respect to a subsidiary conspiracy. (Pet. 63.) The court initially ordered the cause remanded "with directions to enter judgment for the appellant" (Pet. 64), but on the Government's petition for rehearing it modified its opinion so as to remand for a new trial (Pet. 67). It then denied the petitioner's petition for further rehearing with a second supplementary opinion (Pet. 68). It is the order pursuant to this opinion that the petitioner now attacks, contending that he is entitled to an acquittal.

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[4] 26 U.S.C. 1952 ed. 3748 (a) (3).

ARGUMENT

1. The petitioner's principal contention (Pet. 17-35), that the Court of Appeals erred in remanding the case for a new trial rather than an acquittal, is based upon the misconception that the conviction was reversed for insufficiency of evidence rather than considerations relating to the statute of limitations. The petitioner's argument relies so heavily upon this hypothesis that he repeats no less than seven times the misstatement that the conviction was reversed for insufficient proof of a "subsidiary conspiracy" to conceal the primary conspiracy. (Pet. 4, 14, 16, 21-22, 24, 35.) The fact is that the Court of Appeals found the evidence of the petitioner's guilt "so strong as to be almost overwhelming" (Pet. 53), and stated further, "we think there was adequate proof, although circumstantial in character, of the Government's contention that there was an actual subsidiary conspiracy to conceal." (Pet. 55). The court then quoting at length (Pet. 61-63) from *Grunewald* v. *United States*, 353 U.S. 391, held that proof of the existence of such a subsidiary conspiracy within six years of the indictment's return is not sufficient to prevent the running of the statute of limitations (Pet. 63), and ordered the cause reversed and remanded "with directions to enter judgment for the appellant" (Pet. 64).

In the Government's petition for rehearing (which is reproduced in the Appendix, *infra*, pp. 13-19) it was pointed out that the court had overlooked the fact that the central objective of the conspiracy, alleged in the indictment and proved to

exist by the evidence, was not completed in 1946 at the time the tax returns were filed, but continued thereafter so long as the defendants continued to attempt to evade the tax by making false statements and reports to the Government. The overt acts performed in furtherance of this conspiracy were alleged and proved to have taken place as late as 1951 and 1952, well within the term of the statute.[5] The Government called attention to the case of *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46, where it was held that a willful attempt to evade taxes by making false oral statements to Treasury representatives violates Section 145(b) of the Internal Revenue Code of 1939. (*Infra*, p. 16.) It was conceded, however, that the trial judge had not submitted the case to the jury in accordance with this theory, that his instructions were infected with exactly the same "subsidiary conspiracy" error that had caused the reversal in *Grunewald v. United States*, 353 U.S. 391, and that the petitioner should have a new trial. (*Infra*, pp. 17-18.)

The Court of Appeals recognized its error in "accept[ing] the position taken by the court below in its instructions that the conspiracy charged 'was consummated upon the filing of the individual tax returns'" (Pet. 65), and stated "We now think that the record does not require" that conclusion (Pet.

[5] In addition to tax evasion, the indictment charged a conspiracy to make false statements and reports in violation of 18 U.S.C. 1001, *supra*, p. 2. Some of these misstatements were alleged to have been made as late as 1952, well within the three-year limitation applicable to that charge.

67). The court modified its opinion so as to provide for a new trial. (Pet. 67.) Thereafter, in denying a Petition for Rehearing filed by the petitioner, the court distinguished *Sapir* v. *United States*, 348 U.S. 373 (the case upon which the petitioner now places primary reliance—Pet. 17-19, 20, 22, 23, 24), by pointing out that in that case the Court of Appeals had ordered a judgment of acquittal for lack of evidence, and went on to say (Pet. 69-70):

> But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. But as we noted in our modifying opinion, the indictment was sufficient here to present an alternative theory. Furthermore the record contains evidence which would tend to sustain proof of overt acts listed in the indictment which took place as late as 1948, 1951 and 1952.

Clearly, the court was correct in this conclusion.[*] There is no lack of proof in this record. The sole

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[*] The only possible ground for the petitioner's assertion that the court found that there was insufficient evidence is the court's statement "It now appears to us that the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (Pet. 66.) This statement, taken by itself, might possibly be interpreted to mean that the Government did not introduce evidence to support the alternative theory, though it could have done so under the indictment. However, this was not the court's intention since the evidence as to misstatements and false reports clearly supported the alternative theory (*supra*, p. 6, fn. 2; p. 8).

defect here lies in the erroneous "subsidiary conspiracy" instructions given by the trial judge. (Pet. 51-52; R. 1807-1808.) Against this background the petitioner's present contentions are seen to be wholly without substance. There is no double jeopardy here (see Pet. 17-26), any more than there was in *Grunewald*. The remand for a new trial is "just" and "appropriate" under 28 U.S.C. 2106, *supra*, p. 3 (see Pet. 26-35) for exactly the same reasons which required the new trial ordered by this Court in *Grunewald*, where precisely the same relief was ordered.

2. The petitioner contends, finally (Pet. 35-41), that the United States District Court for the Western District of Washington, Southern Division, was without jurisdiction of the offense because each of the seven overt acts alleged to have been committed within six years of the return of the indictment is alleged to have taken place in the Northern Division of the District. In effect, the petitioner argues that a statute of limitations bars consideration of the earlier acts in a continuing violation for purposes of venue. There is no authority for this proposition, and we submit that the statute has no such effect. Here, the earlier overt acts in furtherance of the continuing conspiracy to attempt to evade taxes (the filing of false returns) satisfied venue requirements; the later overt acts in furtherance of the same continuing conspiracy (the making of false statements to Treasury officials) satisfied statute of limitations requirements.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

APRIL, 1959.

APPENDIX

In the United States Court of Appeals for the Ninth Circuit

No. 15324

WILLIAM R. FORMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

APPELLEE'S PETITION FOR A REHEARING

To the Honorable WILLIAM HEALY, WALTER L. POPE and JAMES ALGER FEE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellee hereby respectfully petitions for a rehearing of the above cause, decided on September 15, 1958, on the grounds that the opinion of this Court (1) conflicts with *United States* v. *Beacon Brass Co.*, 344 U.S. 43, insofar as it is premised on the conclusion that the type of attempted tax evasion here involved was consummated upon the filing of fraudulent returns, and (2) fails, in view of such erroneous premise, to recognize the applicability to this case of the second alternative contention advanced by the Government and approved by the Supreme Court in *Grunewald* v. *United States*, 353 U.S. 391.

GROUNDS FOR REHEARING

Prosecution is not barred by the statute of limitations. The indictment alleges, and the evidence proves, a continuing conspiracy, which was alive at least until January, 1952, to attempt to evade Seijas' taxes. Accordingly, in view of the erroneous instructions, justice requires a new trial rather than entry of judgment of acquittal

This Court has found that "the proof of the conspiracy to evade Seijas' tax liability was * * * so strong as to be almost overwhelming" (op., p. 5), but has reversed the conviction on authority of the *Grunewald* case, *supra*, holding that the main objective of the conspiracy, the evasion of Seijas' taxes, was consummated when the false returns were filed in 1946; that the six-year statute of limitations began to run at that time; and that the period of limitations could not be extended merely because it was shown that there were subsequent acts of concealment to cover up the crime. We believe that the Court has misconstrued the indictment and the proof, and has failed to recognize that there was alleged and proved a *continuing* conspiracy to evade Seijas' taxes, a conspiracy which did not terminate with the filing of the false returns in the years 1943 through 1946, but which embraced fresh attempts to evade those taxes in the years 1947 through 1952. These later attempts, which included the presentation of false books and records and the making of false oral statements to the investigating agents, were not mere efforts to conceal the fact that crimes had been committed by filing false returns, but were overt acts in furtherance of the conspiracy's main objective—tax evasion. These attempts at evasion were successful until April 15, 1953, when Seijas disclosed the $172,400 of unreported partnership income earned in the years 1942-1945, in order to ac-

count for excess assets in his possession in later years. Until Seijas made these disclosures in 1953, the conspirators could not know whether they would finally succeed or fail in their primary purpose—tax evasion.[1]

The filing of the false returns in the earlier years, far from being a consummation of the conspiracy's main objective, constituted only some of the initial steps in the conspiracy's operation. These acts are not even alleged as means of evasion in the indictment, but are relegated to the category of overt acts. The means of evasion alleged in the charging part of the indictment are (op., p. 2):

> by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

Although this Court has found (op., pp. 7-8) that the commission of these acts by both Seijas and appellant were proved, it treats them as nothing more than attempts to conceal the falsity of the returns, i.e., intended solely to cover up overt acts previously

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[1] Under Section 276 of the Internal Revenue Code of 1939, 26 U. S. C. 276, assessment and collection of the tax do not become barred by any statute of limitations in the case of a false or fraudulent return with intent to evade tax. The jury in reaching their verdict in accordance with the instructions given them in this case, necessarily found false or fraudulent returns with intent to evade taxes.

committed, and having no tax evasion motivation. We think the Court erred in so regarding these acts. In *United States* v. *Beacon Brass Co.*, 344 U.S. 43, the Supreme Court expressly held that a willful attempt to evade taxes by making false statements to Treasury representatives violates Section 145(b) of the Internal Revenue Code of 1939, stating (344 U.S. at 45-46):

> The language of § 145(b) which outlaws willful attempts to evade taxes "in any manner" is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.

If such conduct constitutes a felony of attempted tax evasion, *a fortiori* it has sufficient substance to constitute an overt act in furtherance of the main objective of a tax evasion conspiracy. It necessarily follows that the conspiracy in the instant case was shown to have been in existence during the years 1947 through 1951, and at least until January 11, 1952, when Seijas falsely stated to the Treasury agents that he believed his income for the years 1942 through 1945 had been correctly reported on the returns. (R. 18, 1551-1552.) Put another way, the object of this conspiracy was alleged to be the attempted evasion of income taxes. There is proof (op., pp. 7-8) that in the years 1947 through 1952 the conspirators were doing exactly that. Can it be doubted that in January, 1952, the conspiracy was still very much alive, and that it may have remained so until April, 1953, when it finally failed of its purpose? We respectfully submit that the answer must be in the negative, and that, insofar as the opinion in the instant case holds that the conspirators' false statements to the Treasury agents were

not means of attempted tax evasion, it is in conflict with *United States* v. *Beacon Brass Co., supra.*

That portion of the opinion in *Grunewald* relied upon by this Court (op., pp. 10-11) has, we believe no proper application to the proven facts (as distinguished from the instructions given) in this case. Under the state of facts assumed in the Government's first alternative contention in *Grunewald*, the central criminal purpose of the conspiracy had been accomplished beyond the period of limitations, and the Government, to avoid the bar of limitations, was seeking to establish a subsidiary conspiracy designed to cover up the conspirators' tracks in order to avoid detection and punishment. In rejecting that argument, the Court observed (353 U.S. at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the instant case, we submit, the acts in question were done in furtherance of the main criminal objective of the conspiracy—tax evasion—and were not done after that objective was attained. There is no need here for the Government to rely upon a subsidiary conspiracy, either implied or actual, to conceal the main conspiracy.

It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above. As this Court has pointed out (op., pp. 8-9), at the time this case was tried the Court of Appeals for the Second Circuit had recently held in

United States v. *Grunewald*, 233 F. 2d 556, that the kind of "subsidiary conspiracy" instructions given to the jury in the instant case (op., pp. 3-4) were proper. Neither the trial judge nor the Government then had the advantage of the principles later established by the Supreme Court in reversing the conviction in *Grunewald*. Accordingly, the Government made no objection to the trial court's instructions.

Inasmuch as the case was submitted to the jury on a theory which now appears to have been impermissible, and in view of the fact that this error can be corrected upon a new trial, we respectfully petition this Court to modify its opinion of September 15, 1958, in order (1) to correct the statement (op., pp. 5-6) that the conspiracy to evade taxes "was consummated * * * on the filing of Seijas' tax returns in March, 1946", and (2) to remand the cause to the District Court for a new trial rather than entry of a judgment of acquittal.

Dated: Washington, D. C., October 14, 1958.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I, CHARLES K. RICE, one of the attorneys for the appellee, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated: Washington, D. C., October 14, 1958.

CHARLES K. RICE.

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